



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 2 and 90 of the)	PR Docket No. 89-553
Commission's Rules to Provide for)	
the Use of 200 Channels Outside the)	
Designated Filing Areas in the)	
896-901 MHz and 935-940 MHz Bands)	
Allotted to the Specialized Mobile)	
Radio Pool)	
)	
Implementation of Section 309(j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding)	
)	
Implementation of Sections 3(n) and)	
322 of the Communications Act)	GN Docket No. 93-252

FEDERAL COMMUNICATIONS
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MAY 24 '95

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Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Second Further Notice of Proposed Rulemaking

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May 24, 1995

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I. Introduction

Title VI of the 1993 Omnibus Budget Reconciliation Act¹ had a profound effect on the Federal Communications Commission's (FCC or Commission) regulation and assignment of spectrum for wireless communication services. OBRA bifurcated utilization of spectrum into licensees providing commercial mobile radio service (CMRS) and private mobile radio service. OBRA also authorized the Commission to auction spectrum for use in providing CMRS. The

¹ Pub. L. No. 103-66, Title VI, 107 Stat. 312, 392 (hereinafter referred to as OBRA).

FCC instituted the second further notice of proposed rulemaking to address rules for auctioning spectrum to CMRS providers in the 896-901 MHz and 935-940 MHz bands (collectively referred to as the 900 MHz band). Such service is currently allocated for use by specialized mobile radio (SMR) providers.

SMR operators own radio systems that include one or more base transmitters, one or more antennas, and other radio equipment (such as central dispatch units) that third parties (equipped with their own compatible radio transmitters and receivers) may utilize for a fee. SMR service is provided on two separate frequency bands -- 800 MHz and 900 MHz.² Service in the 900 MHz band was only authorized very recently and the Commission has issued licenses only for a small number of cities.

The FCC expects that the 900 MHz band will be utilized for the provision of national or regional SMR service (wide-area service) due to the lack of incumbent licensees for SMR service in the 900 MHz band. The Commission already has issued waivers from certain technical requirements to enable one SMR licensee to

² The Office of Advocacy filed extensive comments in the Commission's proceeding to adopt rules governing the auctioning of spectrum in the 800 MHz band. In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding 800 MHz SMR, PP Docket No. 93-253, Comments of the Chief Counsel for Advocacy, January 5, 1995.

construct a wide-area network. The FCC expects that the auction regime it ultimately adopts for 900 MHz band will further enhance the ability of licensees to construct and operate wide-area networks.³

The Commission also determined that 900 SMR service should be classified as CMRS.⁴ As a result, the FCC concluded that the spectrum should be auctioned as mandated by OBRA. Second Report and Order at ¶ 72. The Commission instituted a second further notice of proposed rulemaking to obtain comment on the rules that should be adopted to govern the auction.⁵ The Office of Advocacy will limit its comments to the proposed treatment of designated entities.⁶

³ In the Matter of Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 90-553, Second Report and Order, slip op. at ¶¶ 31-32, 41 (April 17, 1995) (Second Report and Order).

⁴ Second Report and Order at ¶¶ 27-28, *citing* Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, Third Report and Order, GN Docket 93-252, ¶ 77 (September 23, 1994).

⁵ In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-252, Second Further Notice of Proposed Rulemaking, slip op. (April 17, 1995) (SFNPR).

⁶ OBRA's mandate to auction spectrum also required the FCC to adopt regulations that would provide so-called designated entities (businesses owned by women and minorities, small businesses, and rural telephone companies) with opportunities to purchase spectrum.

II. Definition of a Small Business

The FCC again faces the need for determining the size of business that will be eligible for any special treatment when the 900 MHz spectrum is auctioned. The Commission's job is made more difficult by the requirements in the Small Business Act that any size standard adopted by the agency that is not in conformance with those promulgated by the Small Business Administration (SBA) must be approved by the Administrator of the SBA.⁷ To complicate matters even further, § 3 of the Small Business Act was amended in 1994 to provide a wider range of criteria upon which an agency and the Administrator may base a small business definition.

In its initial efforts to implement OBRA's auction authority, the Commission determined that a small business would be one that had no more than six million dollars in net assets and two million dollars in net income.⁸ This standard was developed by the SBA to define eligibility for its financial

⁷ The Commission is aware of this requirement and has sought approval of size standards in both the narrowband and broadband PCS proceedings.

⁸ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket NO. 93-253, Fifth Report and Order ¶ 172 (July 15, 1994) (hereinafter Fifth Report and Order).

assistance programs.⁹ It was not, as the Office of Advocacy had noted on numerous occasions, an appropriate standard to determine eligibility for assistance in spectrum auctions or any other regulatory program. Nevertheless, this standard was utilized in the recent auction of ten nationwide licenses for narrowband PCS.

The Commission, after significant discussions with, among others, the Office of Advocacy, determined that the financial assistance standard adopted by the SBA would be inappropriate for use in the broadband PCS auction. The FCC adopted the Office of Advocacy's proposal that any entity with less than \$40 million in gross revenue would be considered a small business and eligible for any special provisions developed by the Commission. The FCC also adopted the \$40 million revenue standard for regional narrowband PCS auctions.

The Office of Advocacy and the Commission focused on revenue as the appropriate measure because the Small Business Act at that time restricted alternate size standards to be based on gross

⁹ The SBA also has developed size standards for various industries. If an entity falls below that standard, it can participate in various government contracting programs established for small businesses. The SBA size standard for mobile communications is any firm with less than 1,500 employees. The Office of Advocacy, the SBA, and the FCC all concur that this is an inappropriate definition for the purpose of implementing OBRA's auction requirements.

revenue for non-manufacturing firms.¹⁰ The Administrator had no discretion to approve a size standard for PCS on any other factor.

In 1994, Congress revisited this issue in its reauthorization of the SBA. Congress, at the urging of the Administrator, decided that the original focus on revenue for non-manufacturing industries (and number of employees for manufacturing industries) was too restrictive. It authorized the Administrator to approve a size standard based on any number of relevant factors.¹¹ Thus, the Commission is no longer restricted to developing a size standard for the SMR auction solely on gross revenue. While other proxies for measuring small businesses in the SMR industry may exist (number of subscribers, channels owned, and area covered) those standards are particularly inappropriate for determining size in an underutilized band such as the 900 MHz. Thus, the Office of Advocacy opines that a revenue test remains the best and least problematic guideline for measuring the size of an SMR provider and the appropriate demarcation line for small SMR providers.

¹⁰ Small Business Credit and Business Opportunity Enhancement Act, Pub. L. No. 102-366, § 222, 106 Stat. 986, 999 (1992).

¹¹ Small Business Administration Reauthorization Act of 1994, Pub. L. No. 103-403, § 301, 108 Stat. 4187.

The Commission has noted that the definition of a small business should be done on a service-specific basis.¹² The Office of Advocacy concurs. The FCC proposes that the standard for measuring a small business in the 900 MHz band should be \$3 million dollars in gross revenue. SFNPR at ¶ 138. The Commission rejected utilizing the PCS size standards because the amount of spectrum and associated construction costs would be far lower for SMR than PCS. The Commission also states that this standard has received the support of the American Mobile Telecommunications Association -- one of three major trade groups representing the SMR industry. *Id.* at ¶ 139. The Office of Advocacy strongly disagrees with this tentative conclusion.

The Office of Advocacy does not dispute that the construction of a 900 MHz SMR system will be less than for either broad or narrowband PCS. Nevertheless, the cost of construction of the system is not inexpensive. In 1991, the FCC estimated that the cost of a ten channel SMR system in the 900 MHz band would cost approximately \$300,000.¹³ Inflation has increased those costs and the Commission's 1991 estimate obviously did not include the cost of acquiring spectrum in an auction. Thus, it is not inconceivable that the total cost of developing a ten

¹² Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, *recon.* Second Memorandum Opinion and Order at ¶ 145 (August 15, 1994).

¹³ Private Radio Bureau, Federal Communications Commission, Specialized Mobile Radio at 30-31 (1991).

channel SMR system in the 900 MHz band may be anywhere from \$500,000 to \$750,000. To a firm with three million dollars in gross revenue, this represent a significant capital investment.

The aforementioned estimate is only for one ten-channel block of spectrum. The Commission's rules regarding 900 MHz spectrum allow potential licensees to aggregate blocks in order to construct wide-area networks. In fact, the FCC expects such aggregation and development of wide-area networks. Thus, a small firm interested in two contiguous blocks may be looking at costs of nearly half their gross annual revenue if the Commission's \$3 million standard is adopted. This would foreclose the vast majority of small businesses from even thinking about the development of a wide-area network.

The Office of Advocacy opines that the capital costs, acquisition costs, and financial wherewithal to stay in the SMR market militate against the adoption of the \$3 million dollar standard. The Office of Advocacy proffers that a definition of \$15 million dollars, the same one the Office advanced in the 800 MHz SMR proceeding, is more appropriate. Firms with revenue of up to \$15 million dollars would have the financial capacity needed to acquire spectrum, construct a system (including a wide-

area system), and compete in a potentially crowded voice mobile telecommunications marketplace.¹⁴

The FCC's ultimate demarcation of small business for purpose of 900 MHz spectrum auction also must take into account the activity in the 800 MHz auctions. It is quite conceivable that the Commission's rules in the 800 MHz may require some fairly large firms to rethink their SMR strategy if they do not obtain the spectrum they desire in the 800 MHz band. These firms may gravitate to the 900 MHz band to attain their objectives in the mobile telecommunications marketplace. The potential for migration by large firms into different auction arenas led the Commission to increase the size of firm that would be designated a small business for purpose of regional auctions for narrowband PCS. The Office of Advocacy opines that the same phenomenon may occur in the SMR auctions and the Commission's rationale for increasing the small business size standard in narrowband PCS applies with equal strength in the 900 MHz SMR auction. Thus, the FCC should strongly consider the adoption of a small business definition with a higher gross revenue standard.

Finally, the Commission should discount the concurrence of the AMTA in the tentative determination of a small business. As

¹⁴ SMR providers in the 900 MHz would be competing against providers in the 800 MHz band as well as PCS and cellular operators. Firms with thin financial resources, stretched even more by the acquisition of spectrum, are unlikely to survive in the marketplace.

the comments in the 800 MHz proceeding demonstrate, AMTA does not represent the entire SMR industry. A significant portion of the industry disagrees with AMTA's position in that proceeding and the Office of Advocacy suspects that the comments in this proceeding will also demonstrate that AMTA's position is not endorsed by the vast majority of small SMR providers. Thus, the FCC should seek to develop a definition of small business based on the comments of the entire industry and not one segment of the industry.

III. Treatment of Designated Entities

As a general proposition, the Office of Advocacy supports the Commission's tentative conclusions regarding the use of bidding credits, reduced down payments, and installment payments for all those entities that meet the Commission's SBA-approved definition of small business. These enhancements for small businesses may be insufficient if very large enterprises migrate to the 900 MHz band from the 800 MHz band as a result of the rules and outcome of the auctions in the 800 MHz band. Therefore, the Office of Advocacy recommends that the Commission delay adopting rules for the 900 MHz band until it has completed its rulemaking on the 800 MHz band.¹⁵ The Office of Advocacy

¹⁵ While it might, from a theoretical standpoint, be preferable to adopt 900 MHz band rules after the completion of the 800 MHz auctions (as the Commission did with narrowband PCS), the delay may substantially reduce the competitive capability of
(continued...)

believes that coetaneous adoption of rules for the 800 and 900 MHz bands represents an adequate compromise. The Commission, from various filings, should be able to glean whether its 800 MHz rules will lead to significant migration in order for certain firms to complete their mobile telecommunication strategies. If the FCC believes that sufficient migration may occur, the Commission may wish to establish an entrepreneur's block or increase the bidding credit for small firms. However, if the rules adopted in the 800 MHz band are not likely to lead to migration by larger firms seeking to achieve their objectives in the new mobile telecommunications market, the enhancements outlined in the SFNPR may be adequate.

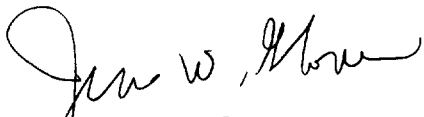
IV. Conclusion

The Office of Advocacy recognizes that the Commission has an inordinately difficult task in developing rules for each service subject to the auction provisions of OBRA. Nevertheless, the Office of Advocacy believes that the Commission has done an admirable job of developing sound auction rules with a great deal

¹⁵(...continued)
SMR providers in the 900 MHz band. Almost all entities commenting in the various proceedings to develop auction rules have noted the importance of early entry into the wireless marketplace. Delay provides a significant benefit to those entities currently in the marketplace. The Office of Advocacy does not wish to further impede the competitive ability of 900 MHz SMR operators while the FCC adopts the most appropriate rules for the service. The cost of being late in a crowded mobile telecommunications market may outweigh any benefits of adopting the best set of rules for auctioning the 900 MHz.

of celerity. Nevertheless, the Office of Advocacy believes that the Commission's tentative determination of \$3 million dollars as the appropriate size standard is insufficient and will not pass muster with the Administrator of the SBA. Thus, the Office of Advocacy strongly urges the Commission to increase that size standard to \$15 million. Furthermore, the Office of Advocacy believes that any rules for treatment of designated entities must be developed in light of the Commission's parallel proceeding on auction rules for SMR in the 800 MHz band.

Respectfully submitted,



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